Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

v.

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## Reply Brief for Petitioners.

FRANCIS X. BELLOTTI,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

## Table of Contents.


I. The lower state courts have not held consistently that questions addressed to prospective jurors on voir dire are constitutionally required in every instance 1

II. Refusal of the trial judge to examine prospective jurors regarding possible racial prejudice does not necessarily void a criminal conviction absent a demonstration of prejudice 3

Respondent's reliance upon Peters v. Kiff, 407 U.S. 493 (1972), is misplaced 3

III. Retroactive application of a rule requiring that prospective jurors be inquired of as to possible racial prejudice during voir dire would have a substantial impact upon the administration of justice 4

Conclusion 6


## Table of Authorities Cited.

### Cases.


Alderman v. United States, 394 U.S. 165 (1969) 3

Aldridge v. United States, 283 U.S. 308 (1931) 2

Commonwealth v. Anderson, 334 N.E. 2d 61 (1975), Mass. App. Ct. Adv. Sh. (1975) 1082 5n

Commonwealth v. Harrison, 321 N.E. 2d 672 (1975), Mass. App. Ct. Adv. Sh. (1975) 59 5n

Commonwealth v. Jackson, 327 N.E. 2d 912 (1975), Mass. App. Ct. Adv. Sh. (1975) 743 5n

| | |
|---|---|
| Frasier v. United States, 267 F. 2d 02 (1st Cir. 1959) | 2n |
| Gholston v. State, 221 Ala. 556, 130 So. 69 (1930) | 2 |
| Ham v. South Carolina, 409 U.S. 524 (1973) | 2, 5 |
| Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934) | 2 |
| Hill v. State, 112 Miss. 260 (1916) | 2 |
| Irvin v. Dowd, 366 U.S. 717 (1961) | 3 |
| Jones v. Cunningham, 371 U.S. 236 (1963) | 5 |
| Jordan v. Massachusetts, 225 U.S. 167 (1912) | 3 |
| King v. United States, 362 F. 2d 968 (D.C. Cir. 1966) | 2n |
| People v. Decker, 157 N.Y. 186, 51 N.E. 1018 (1898) | 2 |
| Peters v. Kiff, 407 U.S. 493 (1972) | 3 |
| Pinder v. State, 27 Fla. 370 (1891) | 2 |
| Silverthorne v. United States, 400 F. 2d 627 (9th Cir. 1968) | 3 |
| State v. McAfee, 64 N.C. 339 (1870) | 2 |
| United States v. Booker, 480 F. 2d 1310 (7th Cir. 1973) | 2n |
| United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971) | 2n |
| United States v. Gore, 435 F. 2d 1110 (4th Cir. 1970) | 2n |
| Witherspoon v. Illinois, 391 U.S. 510 (1968) | 4 |


STATUTES.


| | |
|---|---|
| United States Constitution, Sixth Amendment | 2, 3, 4 |
| Mass. Gen. Laws, c. 250, §§ 1, 9 | 5 |


# In the Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1216.

THEODORE RISTAINO ET AL.,
PETITIONERS,

*v.*

JAMES ROSS, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## Reply Brief for Petitioners.

### I. THE LOWER STATE COURTS HAVE NOT HELD CONSISTENTLY THAT QUESTIONS ADDRESSED TO PROSPECTIVE JURORS ON VOIR DIRE ARE CONSTITUTIONALLY REQUIRED IN EVERY INSTANCE.

Respondent relies upon numerous state court cases to support his contention that questions concerning possible racial bias are constitutionally required regardless of the circum-

stances of the case.[1] However, examination of these cases reveals that, for the most part, the various state courts merely note approval of expanded voir dire. For example: *Gholston* v. *State*, 221 Ala. 556, 130 So. 69 (1930), held that it was not reversible error for the trial court to ask the requested question and that discretion whether to put the questions remained in the trial judge; *Herndon* v. *State*, 178 Ga. 832, 174 S.E. 597 (1934), specifically rejects the contention that specific questions are constitutionally required; *People* v. *Decker*, 157 N.Y. 186, 51 N.E. 1018 (1898), is based upon the state code of criminal procedure. Petitioners concede that two cases relied upon by respondent were apparently decided upon constitutional grounds, *Hill* v. *State*, 112 Miss. 260 (1916); *Pinder* v. *State*, 27 Fla. 370 (1891); however, the decisions in these cases rested upon the Sixth Amendment right to an impartial jury, a position not adopted by the majority of this court in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). Moreover, in *State* v. *McAfee*, 64 N.C. 339 (1870), the court, in holding that the denial of the question addressed to racial prejudice was reversible error, pointed out that prejudice would be likely to arise " . . . especially in charges of this character" (rape). 64 N.C. at 340. Thus the decision is consistent with the construction of *Ham* urged by the petitioner.

Petitioners further submit that the federal cases relied upon by respondent were decided either solely within the court's supervisory power and in accord with the dictates of *Aldridge* v. *United States*, 283 U.S. 308 (1931),[2] or involved special

[1] See, Respondent's Brief, p. 24, fn. 13, and p. 30, fn. 19.

[2] *Frasier* v. *United States*, 267 F. 2d 62 (1st Cir. 1959); *King* v. *United States*, 362 F. 2d 968 (D.C. Cir. 1966); *United States* v. *Booker*, 480 F. 2d 1310 (7th Cir. 1973); *United States* v. *Carter*, 440 F. 2d 1132 (6th Cir. 1971); *United States* v. *Gore*, 435 F. 2d 1110 (4th Cir. 1970).



circumstances, *e.g.*, *Silverthorne* v. *United States*, 400 F. 2d 627 (9th Cir. 1968), "voluminous" pretrial publicity.

## II. Refusal of the Trial Judge to Examine Prospective Jurors Regarding Possible Racial Prejudice does Not Necessarily Void a Criminal Conviction Absent a Demonstration of Prejudice.

### *Respondent's Reliance upon Peters v. Kiff, 407 U.S. 493 (1972), is Misplaced.*

In *Peters*, *supra*, the majority of the Court held that to subject a defendant to trial by a jury which was "plainly illegal in their composition" denied a defendant due process of law. Given the illegal nature of the jury involved in that case and based upon the proposition that " . . . our system of law has always endeavored to prevent even the *probability* of unfairness," 407 U.S. at 502 (emphasis supplied), the majority appears to have foregone the requirement that it be demonstrated that a petitioner's *conviction has resulted from* the denial of a federally secured right. *Alderman* v. *United States*, 394 U.S. 165, 171-174 (1969).

Respondent seeks to equate the "possibility" of prejudice in the instant case with the "probability" of prejudice inherent in *Peters*, *supra*. Petitioners suggest that there is no basis in law for making such an equation.

In addition, petitioners suggest that the circumstances of the instant case were not such as to create a serious "probability of unfairness" so as to negate the requirement that it be demonstrated that the trier of fact was actually affected by prejudice. Cf. *Jordan* v. *Massachusetts*, 225 U.S. 167 (1912), *Irvin* v. *Dowd*, 366 U.S. 717 (1961). The instant case does not involve a defendant's Sixth Amendment right to an impartial jury. The

question here is whether a trial judge is constitutionally required to pose certain questions to prospective jurors when so requested by a defendant. If the request is denied or if no such request is made the composition of the jury may well remain the same. Petitioners suggest that there is no logical basis for maintaining that in the first instance it is probable that a non-impartial jury will result, but that in the second instance the jury will meet Sixth Amendment requirements. Rather, the questions are mandated only when the circumstances attendant to the case dictate that fundamental fairness (not perfection) may be met only if the defendant is allowed to pose questions designed to elicit prejudicial attitudes which would affect the jurors' ability to render an independent judgment based only upon the evidence adduced at trial. In this posture, petitioners suggest that the burden is upon the respondent to demonstrate that the refusal to ask the proposed question constitutes actual or probable prejudice. ***Witherspoon*** v. ***Illinois***, 391 U.S. 510 (1968).

## III. Retroactive Application of a Rule Requiring that Prospective Jurors be Inquired of as to Possible Racial Prejudice during Voir Dire would have a Substantial Impact upon the Administration of Justice.

Respondent seeks to minimize the impact of retroactive application of a rule requiring a trial judge to pose questions designed to elicit possible racial prejudice to prospective jurors on voir dire by relying upon conversations with unnamed judges (Respondent's Brief, p. 42) which are totally outside the record before this Court. Petitioners would bring to the attention of this Court the fact that three additional cases involving the same issue have been decided by the Appeals Court of



Massachusetts subsequent to the filing of petitioners' brief.[3] Four additional cases are now pending argument or decision on the same or related issues.[4]

Respondent also seeks to minimize the effect of retroactive application by asserting that many convicted felons would already have been released from incarceration. In support of this proposition he cites some undocumented figures purportedly supplied by the Massachusetts Department of Correction (Respondent's Brief, p. 41). Respondent totally ignores the fact that petitions for writ of habeas corpus may be filed in the federal court by state prisoners released on parole. ***Jones*** v. ***Cunningham***, 371 U.S. 236 (1963). He also ignores the fact that the Court has not ruled on whether the proposition announced in ***Ham*** was a constitutional rule of universal application or merely limited to its facts. Hence, the enunciation of a new rule now would allow prisoners still incarcerated or on parole to bring a writ of error in the state courts. The writ of error is not limited to those incarcerated at the time the proceeding is brought but is available to attack a judgment, not the constitutionality of custody. Mass. Gen. Laws, c. 250, §§ 1, 9. Petitioners therefore submit that neither they nor the Supreme Judicial Court of Massachusetts have overstated the substantial effect on the administration of justice a retroactive application of the rule of ***Ham*** (assuming ***arguendo***, that such a rule was announced therein) would have in this Commonwealth.

---

[3] ***Commonwealth*** v. ***Jackson***, 327 N.E. 2d 912 (1975), Mass. App. Ct. Adv. Sh. (1975) 743; ***Commonwealth*** v. ***Anderson***, 334 N.E. 2d 61 (1975), Mass. App. Ct. Adv. Sh. (1975) 1082; ***Commonwealth*** v. ***Harrison***, 321 N.E. 2d 672 (1975), Mass. App. Ct. Adv. Sh. (1975) 59.

[4] ***Commonwealth*** v. ***Corey and Hall***, No. 419; ***Commonwealth*** v. ***James Hall***, No. 287; ***Commonwealth*** v. ***Frank Grace***, No. 63; ***Commonwealth*** v. ***Ross Grace***, No. 66.

**Conclusion.**

For the reasons stated in their brief and in this reply brief, petitioners respectfully request this Court to reverse the judgment of the court below.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240